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United States Smelting Refining and Mining Company v. Paul D. Nielsen and The Industrial Oommission of Utah : Brief of Plaintiff

IN THE SUPREME COURT OF THE STATE OF UTAH

UNITED STATES SMELTING REFINING AND MINING COMPANY,

Plaintiff,

vs.

PAUL D. NIELSEN and the INDUSTRIAL COMMISSION OF UTAH

Defendants.

Case No. 10703

BRIEF OF PLAINTIFF

On Review From Order of the Industrial Commission of Utah

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NATURE OF THE CASE

The plaintiff United States Smelting Refining and Mining Company claims that under the Workmen's Compensation Laws of the State of Utah, there is no liability for payment of temporary total disability or permanent partial disability after the expiration of "six years from the date of injury".

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Industrial Commission of Utah denied plaintiff's defense and made an award to Mr. Paul D. Nielsen for complications arising in 1965 out of an injury *which occurred in 1952.*

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the order of the Industrial Commission of Utah and a decision of this Court construing the Statute of Limitations contained in the section pertaining to temporary total disability and permanent partial disability.

STATEMENT OF FACTS

In this case, Mr. Paul D. Nielsen was injured on September 16, 1952 while he was employed by the plaintiff as a miner at its Lark Mine. His left leg and left knee cap were broken. (Tr. 12) The plaintiff is self-insured. On February 5, 1954, Mr. Nielsen received a permanent partial disability rating of 30% loss of use of the left lower extremity at the hip. (Tr. 20) The award was paid in a lump sum payment for the purpose of purchasing a tavern at Moroni, Utah. (Tr. 22) Since March 1, 1954, Mr. Nielsen has not worked for the Company, being self-employed at his tavern.

In March of 1965, Dr. Robert H. Lamb advised the plaintiff employer that Mr. Nielsen should have arthrotomy of the left knee and a pallectomy (removal of the left

kneecap). (Tr. 28) The Company admitted liability for the hospital and surgical expenses of the operation, but it reserved the right to a hearing pertaining to its legal obligation to pay temporary total disability benefits and permanent partial disability benefits in view of the fact that more than six years had expired since the date of injury. (Tr. 29)

The operation for the removal of the kneecap was performed on April 12, 1965, (Tr. 38) but apparently during the course of the operation, the ulnar nerve in Mr. Nielsen's elbows became pinched causing a bi-lateral ulnar palsy. Mr. Nielsen complained that he had lost every bit of strength in his arms and hands and some loss of sensation and use of his fingers. The Medical Panel found a weakness and atrophy of the intrinsic hand muscles supplied by the ulnar nerve which was greater on the left side. (Tr. 56) The Medical Panel concluded that the patient's bi-lateral ulnar palsy occurring acutely at the time of surgery is an uncommon, but by no means unusual complication of surgery. (Tr. 60) The surgical removal of the left kneecap was successful and no further permanent partial disability award was made concerning the left leg. The Medical Panel found a 10% permanent impairment of the right arm, a 12% permanent impairment of the left arm, and a total of 13% impairment of the whole man. (Tr. 66)

Based upon the Medical Panel Report, the Commission ordered the employer to pay permanent partial compensation of 12% of 200 weeks (24 weeks—amounting to $725.00) and temporary total disability based on the 1952 rate, amounting to $1,011.21. (Tr. 91)

ARGUMENT

THE LEGISLATURE ONLY AUTHORIZED PAYMENT OF TEMPORARY TOTAL COMPENSATION AND PERMANENT PARTIAL COMPENSATION FOR SIX YEARS FROM THE DATE OF INJURY.

Mr. Nielsen's right to compensation is governed by the law in force at the time of the occurrence of the injury. *Silver King Coalition Mines Co.* v. *Industrial Commission,* 2 Utah 2d, 1, 268 P2d. 689.

Although there is no practical difference in the statutory language pertaining to the six year limitations between 1952 and 1965, plaintiff cites in its brief the provisions of the statute as it existed under the 1951 Amendment. The Table of Contents indicates the corresponding section found in Utah Code Annotated 1953.

The pertinent portions of the statutes provide:

"Sec. 42-1-61. Compensation — —Temporary Disability.

> In case of temporary disability, the employee shall receive sixty per cent of his average weekly wages so long as such disability is total, not to exceed a maximum of $27.50 per week and not less than a minimum of $17.50 per week, plus five per cent of the amount of such award for each dependent minor child under the age of eighteen years, up to and including five such minor children or a maximum increase of twenty-five per cent in case of five or more such minor dependents; *provided* that where the wage earned at the time of injury is

less than $17.50 per week, the amount of wages earned shall be the amount of compensation to be paid. *In no case shall such compensation continue for more than six years from the date of the injury* or exceed $7800.00 in the case of no minor children, as herein defined, or $7800.00, plus five per cent for each minor child, up to a maximum of five such minor children or a maximum payment of $9,750.00."

"Sec. 42-1-62. For partial Disability.

Where the injury causes partial disability for work, the employee shall receive, during such dis*ability and for a period of not to exceed six years from the date of the injury . . .*"

(Chapter 55, Laws of Utah 1951)

The Court will note that the limitation on medical, nursing and hospital expenses (42-1-75 Laws of Utah 1951) has always been expressed in terms of a total amount to be paid, with the further proviso:

". . . provided that if upon application to and investigation by the industrial commission it shall find that in particular cases such an amount is insufficient, it shall determine and fix such a reasonable amount as under all the circumstances may be fair and just . . ."

Although the Company had already paid in excess of the statutory amount of medical expenses (Tr. 24) for Mr. Nielsen it voluntarily paid all medical expenses incurred in the removal of Mr. Nielsen's kneecap. However, the company denied liability for total temporary and permanent partial disability. (Tr. 29) The language of the Supreme Court in *Harding* v. *Industrial Commission,* 83 Utah 376,

28 P2d 182, is relied upon as protecting the company in this position:

> "It would be unjust to both the employee and the insurance carrier if the law were that when the insurance carrier once undertakes to provide medical or other care for an injured workman, it has lost all right to afterwards defend against what it believes to be an unjust or illegal claim."

The history of the statutes and our Utah cases construing them commence in 1917, when the Workmen's Compensation Laws were first enacted. The section pertaining to total temporary disability provided:

> "Sec. 76. *Rate and limit for temporary disability.* In case of temporary disability, the employee shall receive fifty-five per cent of his average weekly wages so long as such disability is total, not to exceed a maximum of twelve dollars per week, and not less than a minimum of seven dollars per week; *but in no case to continue for more than six years from the date of injury*, or to exceed four thousand five hundred dollars."

> "Sec. 77. Rate, *time* and schedule for partial disability. Where the injury causes partial disability for work, the employee shall receive, during such disability for work, the employee shall receive, during such disability and *for a period of not to exceed six years* beginning on the eleventh day of disability, a weekly compensation equal to fifty-five per cent of the difference between his average weekly wages before the accident and the weekly wages he is able to earn thereafter, but not more than twelve dollars a week. . . ."

(underscoring added)
(Laws 1917, Chapter 100)

By 1933, the weekly payments had been increased from $12.00 per week to $16.00 per week and the waiting period had been reduced from 11 days to 4 days, but the two six year clauses remained the same. (42-1-61 and 42-1-62, Rev. Statutes of Utah 1933).

In 1936, the case of *Hardy* v. *Industrial Commission,* 89 Utah 561, 48 P2d 15 came before the court. Mr. Hardy was injured in 1927. He was paid compensation for some period of time and was then medically discharged. After more than six years had elapsed he had further surgery and prosecuted his claim to the Industrial Commission which denied it. The Supreme Court held that the commission had jurisdiction because Mr. Hardy had written a letter to the Commission within one year from the date of injury and the compensation carrier had assumed liability and paid benefits. The court further noted that the statute pertaining to *permanent partial* disability provided.

> "Where the injury causes partial disability for work, the employee shall receive during such disability and for a period of not to exceed six years beginning on the fourth day of disability . . ."

The court then held:

> "The limitation provided by the section relates to the disability period and not the calendar period dating from the injury."

An important fact to note is that surely Mr. Hardy was totally and temporarily disabled from work by his recurring

osteomyelitis, but either no claim was made for it, or no appeal was taken to the Supreme Court concerning it, but in any event the opinion fails to mention it. The Hardy case made no attempt to construe the two statutes together. The statute pertaining to total temporary disability provided:

> "In no case shall such compensation continue for more than *six years from the date of the injury* or exceed $5,000."

In 1939, the Utah Legislature amended 42-1-62 (Compensation for partial disability) to read the same as 42-1-61 (temporary total disability) by adding the underscored language below:

> ". . . shall receive during such disability and for a period of not to exceed six years *from the date of the injury,* a weekly compensation . . ."

Plaintiff submits that by the 1939 amendment, the Legislature obviously intended to correct the interpretation given the permanent partial disability statute by the Hardy decision. To add the phrase "from the date of the injury" was intended to mean a limitation of six calendar years in case of permanent partial disability payments, the same as total temporary payments. It could not mean anything different. It is orderly and customary to provide a statute of limitations in all types of litigation beyond which, certain claims and injuries cannot be prosecuted. Chapter 12 of Title 78, expresses a limitation of eight years to six months for all the various forms of action to be prosecuted. The original act of *1917* stated in its title "Rate and *limit* for temporary disability (Sec. 76); Rate, *time* and schedule for partial disability (Sec. 77, Ch. 100, Laws of Utah

1917). The interpretation given these statutes by our present Industrial Commission is that "The Commission has always interpreted said sections to mean casualty years and not calendar years." (Tr. 90) This interpretation flaunts and ignores the expression of *TIME* in both statutes. Six years from the date of injury means a limitation of liability within the prescribed *TIME*. The Hardy case should no longer be followed in view of the 1939 amendment to the statute pertaining to permanent partial disability, and the fact that neither Mr. Hardy, nor the Industrial Commission, nor the Supreme Court thought that he was entitled to total temporary compensation.

In 1949, the case of *Utah Apex Mining Co.* v. *Industrial Commission,* 116 Utah 305, 209 P2d 571 decided that the Commission had jurisdiction more than six years after the date of the injury. In this case a Mr. Peterson was injured in 1931 and had a subsequent hospitalization for osteomyelitis in 1947. Once again, as in the Hardy case, the principal issue was whether or not the Commission had jurisdiction, the employer claiming that no claim had been filed within the 3 year period provided by 42-1-92 (our present 35-1-99). The court held that the employer's payment of compensation and acknowledgment of liability precluded it from contending that there was a lack of jurisdiction. As to the six year limitation, the opinion of the court relied upon the Hardy case, but failed to note that *Mr. Peterson was injured in 1931 and all of his rights should have been determined as of that date, which was prior to the 1939 amendment of the statute. Silver King Coalition Mines Co.* v. *Industrial Commission,* 2 Utah 2d 1, 268 P2d 689.

The Utah Apex Mining Co. decision should be carefully read to see that the court was entirely erroneous in relying upon the Hardy case, and at the same time making the statement that the statutes as to permanent partial disability and total temporary disability "are in substance, identical when we limit our consideration to the provision that payment of compensation shall not continue for more than six years from the date of the injury." (Page 311 of 116 Utah) The Hardy case construed the statute *as to permanent partial disability before the 1939 amendment added "from the date of the injury."* The Utah Apex Mining Co. case was supposedly discussing the statute on *total temporary disability* and its effect on whether the Commission had lost jurisdiction. However, the Supreme Court may have meant to confer jurisdiction upon the Commission only for purposes of payment of medical, nursing and hospital expenses, not total temporary or permanent partial disability payments. This is suggested by the final caveat in the opinion which states:

> "The appeal having been taken only as to whether the Commission had power to act, we do not pass upon the question of the propriety of the additional award for compensation."

It is time for this court to set the law straight and declare that the Legislative pronouncement that "In no case shall such compensation continue for more than six years from the date of the injury or exceed $7800.00 . . ." means that there is a time limitation in addition to a monetary maximum on payment of workmen's compensation benefits.

The concept of "casualty years" as expressed by the Commission in its present decision is entirely covered by the dollar maximums which are stated in the statute. The maximum for temporary total disability has been increased from $4500 in 1917 to the present sum of $18,720 in the case of a dependent wife and four minor children (35-1-65). In the fourteen times that the Legislature has increased the amount of weekly payment and total maximum amounts for total temporary disability, it has never changed the six year provision. This further demonstrates that the language in the statute "six years from the date of injury" was never intended by the Legislators to limit the AMOUNT to be paid but was intended to cut off liability at the specified time. The concept of casualty years gives no meaning whatsoever to the statutory language "six years from the date of injury." In the case of *Robinson* v. *Union Pacific R. Co.* 70 Utah 441, 261 P. 9, the court in construing the statute stated:

> "It is our duty when possible to give every word, phrase, clause and sentence, a consistent reasonable meaning."

The phrase "casualty years" is borrowed from the 1936 Hardy decision, which was prior to the 1939 amendment of the statute.

There has not yet been a Supreme Court decision that has upheld and authorized the payment of total temporary disability and permanent partial disability beyond six years from the date of injury.

Plaintiff is aware that the statute (42-1-72 U.C.A. 1943. 35-1-78 U.C.A. 1953) further provides that "the

powers and jurisdiction of the Commission over each case shall be continuing. . . ." It is submitted that this is only operative within the six year period or for hospital and medical expenses which the Commission deems are fair and just although in excess of the statutory amount. It is submitted that the provisions of the Utah statutes were intended to accomplish the same result as those found in California.

Wests Annotated California Codes — Labor

> Section 5410. "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the commission in such cases shall be a continuing jurisdiction at all times within such period. . . ."
>
> Section 4656. "Aggregate disability payments for a single injury causing temporary disability shall not extend for more than 240 compensable weeks within a period of 5 years from the date of the injury."

Our present statute 35-1-99 provides:

> "If no claim for compensation is filed with the Industrial Commission within three years from the date of the accident or the date of the last payment of compensation, the right to compensation shall be wholly barred."

This statute of limitation was upheld by this court in *Jones* v. *Industrial Commission* 17 U2d 28, 404 P2d 27.

Also, the statute providing for payment of death benefits provides (35-1-68 U.C.A. 1953):

> "In case injury causes death within the period of three years, the employer or insurance carrier shall pay . . ."

In *Edwards* v. *Industrial Commission* 112 Utah 472, 189 P2d 124 this court stated that the above language was unambiguous and no interpretation of it was necessary. Subdivision (2) of 35-1-68 further provides for payments in case of death:

> ". . . to continue for the remainder of the period between the date of death *and not to exceed six years after the date of the injury* . . ."

CONCLUSION

It is submitted that considering the workmen's compensation statutes as a whole, there is a definite consistent limitation of liability to six years after the date of injury. There is no authority in the statutes for the Industrial Commission to make an award for temporary total disability and permanent partial disability for surgical complications incurred by Mr. Nielsen in 1965, when the accident sustained by him was in 1952.

Respectfully submitted,

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